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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL R. SHROEDER
CORPORAL
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. Whether it is a denial of due process for a military court to convict a service member of an offense carrying a minimum life sentence by a mere two-thirds' vote when Article 52(b)(2) of the Uniform Code of Military Justice requires a three-fourths' vote to impose a sentence in excess of ten years of confinement?

2. Whether a court-martial can sentence a service member to confinement for life when the military judge improperly instructs the members, on four separate occasions, that they cannot vote on the issue of confinement despite the clear language of Rule for Courts-Martial 1006(d)(5), *Manual for Courts-Martial, United States, 1984* which requires the members to vote on the issue of confinement?

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Michael R. Shroeder, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals, rendered in this proceeding on September 29, 1988.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Shroeder,* 27 M.J. 87, (C.M.A. 1988), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, rendered June 30, 1987, is not reported. *United States v. Shroeder,* No. 86 4317 (N.M.C.M.R. 30 June 1987), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals granted the petition for review in this case on February 29, 1988.

The decision of that court was rendered on September 29, 1988, affirming petitioner's conviction as affirmed by the United States Navy-Marine Corps Court of Military Review on June 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

10 U.S.C. § 852(a)(b), Article 52(a)(b), Uniform Code of Military Justice. Number of Votes Required.

> (a) (1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.
>
> (2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.
>
> (b) (1) No person may be sentenced to suffer death, except by the concurrence of all the members of the

court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death.

(2) No person may be sentenced to life imprisonment or to confinement for more than ten years except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

10 U.S.C. § 918, Article 118, Uniform Code of Military Justice.

Murder.

Any person subject to this chapter who, without justification or excuse kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life;

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

REGULATIONS INVOLVED

Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1006. Deliberations and voting on sentence

(d) Voting

(4) Number of votes required.

(A) Death. A sentence which includes death may be adjudged only if all the members present vote for that sentence.

(B) Confinement for life or more than 10 years. A sentence which includes confinement for life or more than 10 years may be adjudged only if at least three-fourths of the members present vote for that sentence.

(C) Other. A sentence other than those described in subsection (d)(4)(A) or (B) of this rule may be adjudged only if at least two-thirds of the members present vote for that sentence.

(5) Mandatory sentence. When a mandatory minimum is prescribed under Article 118 the members shall vote on a sentence in accordance with this rule.

(6) Effect of failure to agree. If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

STATEMENT OF THE CASE

Petitioner was tried by general court-martial (composed of six officer members or jurors) on 10, 16, 25, 28 and 30 June, and 1 July 1986 for violating Articles 78, 81, 118, 122, Uniform Code of Military Justice (hereinafter, U.C.M.J.).[1] Contrary to his pleas, petitioner was found guilty of one specification of conspiracy to commit murder and one specification of conspiracy to commit robbery, both in violation of Article 81, U.C.M.J., and two specifications of felony murder in violation of Article 118, U.C.M.J. Petitioner was sentenced to be confined for life, to be dis-

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[1] 10 U.S.C. §§ 878, 881, 918 and 922 (1982).

charged from the service with a bad-conduct discharge, to forfeit $300.00 pay per month for 36 months, and to be reduced to pay grade E-1. The convening authority (the individual who set up the court) approved only so much of the sentence as provides for confinement for 25 years, a bad-conduct discharge, forfeitures of $300.00 pay per month for 36 months, and reduction to the lowest enlisted pay grade.

The Navy-Marine Corps Court of Military Review affirmed the findings and sentence in an unpublished decision. *United States v. Shroeder*, No. 86 4317 (N.M.C.M.R. 30 June 1987). The Court of Military Appeals affirmed the findings and sentence as adjudged. *United States v. Shroeder*, 27 M.J. 87 (C.M.A. 1988).

The members (jurors) were instructed by the military judge that concurrence of at least two-thirds (four of six) of the members, was required for a finding of guilty. Record at 427-428. The members were informed that a mandatory life sentence was to be imposed based on their verdict, and, thus, they were instructed not to vote on the confinement aspect of the sentence. Record at 472-474. The military judge reiterated this instruction on three more occasions. When instructed on general voting procedure, the military judge instructed the members to vote on each proposed sentence in its entirety. The sentencing worksheet provided to the members, however, left no option as to confinement. In fact, the imposition of a life imprisonment sentence was typed into the specific language of the worksheet. Appellate Exhibit XIX.

A petition of clemency was written on the face of the sentencing worksheet, signed by all of the members of the panel, and presented to the court. Specifically, the members "unanimously recommend[ed] that clemency be

granted and confinement reduced. The members [stated their belief] . . . that Corporal Shroeder . . . [could] be rehabilitated and present[ed] no threat to society." Appellate Exhibit XIX, Record at 485. All of the members signed this statement. Additionally, all of the members sent individual clemency requests to the convening authority asking him to reduce the amount of confinement adjudged. The individual requests recommended confinement of the petitioner to be 18 months, two years, three years, five years, five years, and ten years respectively.

Premeditated and felony-murder charges carry a mandatory minimum sentence of life imprisonment. Article 118, U.C.M.J., 10 U.S.C. § 918. By his conviction, and the procedures employed by the trial court below, petitioner was automatically sentenced to confinement for life pursuant to Article 118, U.C.M.J.

Both questions presented to this Court in petitioner's writ of certiorari were raised before the Navy-Marine Corps Court of Military Review and the Court of Military Appeals. Each court held that a three-fourths' verdict was not required for a guilty finding to felony murder and that the military judge's instructions were proper.

REASON FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO ENSURE MILITARY COURTS COMPLY WITH THE REQUIREMENTS OF ARTICLE 52(B)(2) OF THE U.C.M.J., DUE PROCESS OF LAW, AND THE MANDATE OF CONGRESS, THAT NO MILITARY MEMBER BE SENTENCED TO CONFINEMENT FOR LIFE EXCEPT BY THE CONCURRENCE OF THREE-FOURTHS OF THE MEMBERS.

The issue presented by this case is the construction of three sections of the Uniform Code of Military Justice (U.C.M.J.). Military courts have falsely construed two of the sections to be in conflict with the third, despite the

clear language of these sections, and congressional intent. Having created this false conflict, military courts have resolved the difficulty by reducing the percentage of votes required for a conviction of felony murder from three-fourths vote to a mere two-thirds. *United States v. Shroeder*, 27 M.J. 87 (C.M.A. 1988); *United States v. Walker*, 7 C.M.A. 669, 23 C.M.R. 133 (1957). These statutes are compatible and should be read harmoniously. *No conflict exists.* However, military courts have chosen to interpret the statutes in favor of a conflict which is prejudicial and inapposite with the decisions of this Court regarding the due process requirements of a jury trial.

Petitioner was convicted of felony murder under Article 118, U.C.M.J. Article 118 requires a mandatory life sentence for individuals convicted of felony murder or premeditated murder.

Article 52(b)(2) of the U.C.M.J. provides that:

> No person may be sentenced to life imprisonment or to confinement for more than ten years except by the concurrence of three-fourths of the members present at the time the vote is taken.

Thus, Congress has required a three-fourths' vote to sentence to life imprisonment and it has set a mandatory life sentence for felony murder. Requiring a three-fourths' vote to convict for both of those offenses would be consistent with both sections.

The military and the courts below, however, have seized upon a third statute, Article 52(a)(2), to create a conflict with Article 52(b)(2) and Article 118, U.C.M.J. Article 52(a)(2) states:

> No person may be convicted of any other offense, except as provided in section 845(b) of this title (article

> 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

The government argued below, and the courts held, that because Article 52(a)(2) calls for a two-thirds' vote to convict, despite the mandatory minimum life sentence required, the requirements of Article 52(b)(2) must be overridden. Thus, the government is permitted to convict an accused and sentence him to life imprisonment, based solely upon a two-third's vote. The government and the courts below have created this false conflict which they have in turn resolved by providing the least possible protection to the accused.

The military's procedure severely impinges upon the rights of service members. Due process requires that the petitioner's conviction be based upon a three-fourths' vote vice a two-thirds' vote.

First, due process requires that court-martial proceedings foster accuracy. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). The government has a compelling interest in the accurate disposition of a trial. *Ake v. Oklahoma*, 470 U.S. 68 (1985). Because the jury in this case consisted of only six members, it was critical whether conviction and the life sentence required concurrence of two-thirds (four) or three-fourths (five) of the members. Every vote was enormously important. The smaller the fact-finding body, the less likelihood there is of a fair result. *Ballew v. Georgia*, 435 U.S. 223, 234 (1978). In *Ballew*, this Court invalidated a Georgia statute allowing a jury of five persons. The plurality opinion concluded:

> the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.

The next term, in *Burch v. Louisiana*, 441 U.S. 130, 134 (1979), this Court held that conviction by other than a

unanimous six-person jury in a trial for a non-petty offense is unconstitutional:

> [W]e think that when a State has reduced the size of its juries to the minimum number of jurors permitted by the Constitution, the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that any countervailing interest of the State should yield.

441 U.S. at 139.[2] The members have no incentive to deliberate once two-thirds of the members have agreed upon a finding. As a result, the minority opinions are never heard during deliberations and the risk of an inaccurate finding is higher.

Second, the severity of the sentence demands the stricter scrutiny of a three-quarter vote. Congress was clearly concerned with the severity of any sentence of confinement in excess of ten years when it adopted Article 52(a). Additionally, Congress and the President have required that findings in capital cases be more accurate. When the death

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[2] The holdings in *Ballew* and *Burch* were based on the sixth amendment's jury trial guarantees, which this Court has stated does not apply to the military. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Ex Parte Quirin*, 317 U.S. 1, 40 (1942). Both *Ballew* and *Burch*, however, emphasized the due process underpinnings of the jury trial right. "Much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six person juries to be unanimous. *Burch v. Louisiana, supra*, 441 U.S. at 138 (citations omitted). A service member is entitled to the due process of law guaranteed by the fifth amendment. *Middendorff v. Henry*, 425 U.S. 25, 43 (1976); *Cooke v. Orser*, 12 M.J. 335, 338 (C.M.A. 1982).

penalty is mandatory, the findings must be unanimous. Article 52(a)(1), 10 U.S.C. § 852(a)(1). The President has additionally provided that the non-mandatory sentence of the death penalty may be considered only after the entry of unanimous findings. *Manual for Courts-Martial, United States, 1984.* Rule for Court-Martial (hereinafter, R.C.M. 1004(a)(2). Neither Congress nor the President has required unanimous findings for conviction of premeditated or felony murder, the two findings for which Congress has provided a mandatory minimum sentence to life imprisonment. Article 118, U.C.M.J., 10 U.S.C. § 918. Accordingly, while a nonunanimous finding protected petitioner from the death penalty, it nevertheless provided the basis for his *mandatory* sentence to life imprisonment.

Due process is based upon the theory that the process which is due depends, in part, upon the extent of the liberty interest at stake. The greater the liberty interest, the greater the level of process that is due to the accused. An accused, such as the petitioner, who risks a mandatory sentence of life imprisonment has a significant liberty interest at stake. This private interest is "almost uniquely compelling." *Ake*, at 78. Congress specifically recognized this concept by requiring a three-fourths' rather than a two-thirds' vote of the members for a sentence to confinement in excess of ten years. Article 52(b)(2), 10 U.S.C. § 852(b)(2). The government has no interest in requiring four vice five members of a six-member jury to vote in favor of convicting the accused.

The petitioner's liberty interest can be protected by properly applying the three applicable statutes. There is no ambiguity or conflict in these provisions. The three-fourths' vote required by Article 52(b)(2) includes within it as a matter of mathematical necessity the two-thirds' vote required by Article 52(a)(2). By instructing the members

that the three-fourths' vote is required to convict in Article 118 felony murder cases, the three sections easily could have been harmonized. In this case, had five of the six members voted for conviction, the accused would have been convicted by at least two-thirds of the members voting, satisfying Article 52(a)(2). Because the life sentence is the mandatory minimum, he also would have been sentenced by the three-fourths' majority required by Article 52(b)(2).

Even if there appeared to be an ambiguity or conflict in the statutory provisions applicable, the principles for resolving such conflict are clear, and lead to the construction urged by the petitioner. Under settled principles, this Court would adopt any fair construction of a statute by which serious doubt as to its constitutionality may be avoided. *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). This Court has been "willing to assume a congressional solicitude for fair procedure, absent express statutory language to the contrary." *Id.* Furthermore, ambiguity in a criminal statute must be resolved in favor of an accused *Liparota v. United States*, 471 U.S. 419 (1985). Together these principles mandate a three-quarters' vote on a verdict for which a life sentence will be imposed.

The government has no legitimate interest in requiring only a two-thirds' vote for a premeditated murder conviction, and thus necessarily a sentence of life imprisonment. The military community and society on the whole does not benefit by allowing conviction and sentencing for this serious offense on a two-thirds' as opposed to three-fourths' vote. There is no legitimate reason for systematically increasing the possibility of life imprisonment by reducing the percentage of members necessary to convict under Article 118.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE FOUR INCORRECT INSTRUCTIONS GIVEN TO THE MEMBERS VIOLATED DUE PROCESS OF LAW BY PREVENTING THE MEMBERS FROM VOTING ON THE ISSUE OF CONFINEMENT.

In his sentencing instructions, the military judge repeatedly told the members that they were *required* to impose confinement at hard labor for life. Contrary to the sentencing procedures prescribed by the President, the judge instructed the members of the jury that they could not vote on the issue of confinement. The record reflects, *inter alia*, the following specific instructions regarding the issue of confinement:

> You are at liberty to arrive at lesser sentences, except for *the question of confinement* in this case . . .

Record at 472. Emphasis added.

> There are a variety of types of punishment that can be imposed in this case and I will list some of them for you; some of them you may feel are not appropriate and perhaps you feel that none of them are appropriate, *except for the question of confinement.*

Id. at 473. Emphasis added.

> Confinement, of course is confinement at hard labor in a Navy brig or federal prison. As I have said, in this case, based on your findings, *you must impose confinement at hard labor for life.*

Id. Emphasis added.

> Now, *other than the question of confinement*, you are at liberty to arrive at any lesser punishment in any of the other fields.

Id. at 474. Emphasis added. The members were also supplied with a sentencing worksheet which did not permit them to vote on the question of confinement. Appellate

Exhibit XIX. In fact, the pre-written colloquy for the members to read while sentencing the petitioner specifically included a sentence of confinement for life.

The military judge's statements were legally incorrect. Rules for Court-Martial 1006(d)(5) specifically provides that when a mandatory minimum sentence is prescribed under Article 118, the members *must* still *vote* to impose that mandatory minimum sentence. Contrary to the military judge's instructions the members must vote and *three-fourths must concur in the mandatory life sentence before it may be imposed.* R.C.M. 1006(d)(4)(B). If the required number of members cannot agree on the mandatory minimum sentence, Rules for Court-Martial 1006(d)(6) provides that a mistrial may be declared as to the sentence and the case returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

The President has developed specific procedures which must be complied with in order to sentence as individual. Despite the fact that these rules are straight-forward, the judge chose not to comply with these procedures. The Court has held that sentencing is a "critical stage" in a criminal proceeding. *Gardner v. Florida*, 430 U.S. 349, 359 (1977). The defendant has a legitimate interest in the character of the sentencing procedure. *Witherspoon v. State of Illinois*, 391 U.S. 510 (1968). Due process should, as a bare minimum require the government to comply with the procedures prescribed by law.[3] The government has no interest in bypassing the prescribed sentencing procedures

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[3] The Due Process Clause protects the sentencing process. Eleven year ago, in dealing with the proper procedure to be followed in sentencing capital cases, this Court stated, ". . . it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner*, at 359.

which allow for individual consideration of each defendant. *Jurek v. State of Texas*, 428 U.S. 262 (1976).

The government argued below, and the Navy-Marine Corps Court of Military noted that when discussing general voting procedures, the trial judge stated that the members must vote on each proposed sentence "in its entirety . . ." Record at 481. The government contends that this instruction resolved any potential errors. However, this abstract instruction was contradicted by four very specific, improper instructions. Moreover, the sentencing worksheet did not give the members an opportunity to vote on the issue of confinement.

At best, the charges were inconsistent and misleading. Instructions to the members must not be misleading. *Bollenbach v. U.S.*, 326 U.S. 607, 614 (1946). The members were told *no less than four times* that they were at liberty to arrive at a lesser sentence "*except* for the question of confinement." As to confinement they were told, "you *must* impose confinement at hard labor for life." Assuming *arguendo*, that the members understood what the trial judge may have meant when he told them they were to vote on the sentence "in its entirety," which instructions did they follow? The conflicting instructions cast *significant* doubt on the result of the members' deliberations.

With regard to this essential matter, the government argued below that the trial defense counsel had a duty to seek clarification, either by objecting to the proposed instruction or by requesting an additional instruction. In the absence of either, the government argued, and the Navy-Marine Corps Court of Military Review considered the error to be waived on appeal. The Court of Military Appeals failed to consider the issue of waiver.

The law regarding this matter is set forth in R.C.M. 1005(f). The Rule states that "failure to object to an in-

struction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection *in the absence of plain error.*" Emphasis added. In *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986), the Court of Military Appeals defined the "plain error" required by this regulation as that stated by this Court in *United States v. Young*, 470 U.S. 1 (1985):

> [I]n order to constitute plain error, the error must not only be both obvious and substantial, it must also have "had an unfair prejudicial impact on the jury's deliberation."

Fisher at 328. This statement of law has direct application to the facts of this case. The assertion of error is not waived on appeal.

There can be no question but that the appellant suffered material prejudice to his substantial rights as a consequence of the military judge's erroneous instructions on sentencing. *We need not speculate with regard to this issue.* Prejudice is reflected quite clearly in the *handwritten clemency recommendation which appears on the sentencing worksheet and in each of the members' letters to the convening authority. See* enclosures (1) through (6) to LT T.P. Moye, JAGC, USNR ltr Ser 5800 17 (FUT) dtd 24 SEP 1986 to CG, 3rd FSSG, FMFPAC; subj: Corporal Michael R. Shroeder, 518 96 1483, U.S. Marine Corps; Clemency Petition. It could not be more apparent that *none* of the members would have voted in favor of the imposition of a life sentence in appellant's case had the members been correctly instructed regarding their obligation to deliberate and vote on such a sentence. The members could have ultimately reconsidered their findings as well. R.C.M. 1009. Consequently, rather than speculate as to what the members might have decided in this case, the case should instead be returned to the trial court for a

rehearing on sentencing. This would have been the proper solution in order to protect the due process of law mandated in a jury sentencing system.

CONCLUSION

The petition for a writ of certiorari should be granted.

APPENDIX A

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

NMCM 86 4317

UNITED STATES

v.

MICHAEL R. SHROEDER, 518 96 1483
CORPORAL (E-4), U.S. MARINE CORPS

Decided 30 June 1987

Before: LEO J. COUGHLIN, A. F. MIELCZARSKI, and N. P. DECARLO

Sentence adjudged 1 July 1986. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Force Service Support Group, FMF, Pacific, FPO San Francisco 96604.

CDR J. A. WILLIAMS, JAGC, USN, Appellate Defense Counsel

Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel

PER CURIAM:

Appellant was convicted at a General Court-Martial (with members) of two specifications of felony murder and two specifications of robbery in violation of Articles 118 and 122 of the Uniform Code of Military Justice (UCMJ). He was sentenced to life imprisonment, forfeiture of $300.00 pay per month for 36 months and bad-conduct discharge. The convening authority reduced appellant's confinement to 25 years and otherwise approved the sentence as adjudged.

This case arises out of the brutal and vicious murder of LCPL Hiquiana and his wife in their Okinawa apartment in the early morning hours of 16 March 1986. Early in the evening on the 15th, appellant and his friends, LCPL's Clark and Reliford, were relaxing and talking at the gymnasium on board Camp Kinser. At some point during their conversation, Clark told the appellant, "we're going to stop the breathing and start the bleeding." In response to appellant's questions about what he meant, either Clark or Reliford told the appellant that they had been watching "some guy" that they were going to kill. They explained that this person had a lot of money at his apartment and that he normally picked up his wife from work in the early hours of the morning and brought her home. They said that they wanted to rob them and slit their throats. Appellant said that he thought that they were joking and were simply playing a joke on him, as they had done many times in the past. Nevertheless, appellant asked to be included in their plans for the night.

Appellant, Clark, Reliford, and appellant's pregnant wife (who was apparently asleep while the conversation at the gym between appellant and the other two took place) left the gym and went to Shroeder's apartment to drop off his wife prior to going out for the evening. On the way to

Shroeder's apartment, appellant was directed to pull into a small convenience store where Clark and Reliford purchased three pair of dish-washing gloves. When appellant asked what they were going to be used for, he was told, "Don't worry, you'll see." Appellant's wife was dropped off at the apartment and the three friends drove off in Shroeder's car. Appellant asked where the other two wanted to go. Clark replied that he wanted to go to the Hiquiana's and he provided appellant with directions. Hiquiana's apartment was thirty minutes away. The three arrived at the apartment complex where Hiquiana lived at about 0050 and parked in front for several minutes. The lights to Hiquiana's apartment were off but Reliford said that they would soon come on because Hiquiana always slept until 0100 when he would get up and drive into town to pick up his wife from work. The lights then went on, prompting Reliford to say, "He's up. Right on time." Hiquiana left the apartment and went to his car. As he passed near appellant's car, Reliford was heard to say "He's mine." Hiquiana got into his car and left. The three also left, driving in the same direction as Hiquiana. Shortly thereafter, Clark spotted Hiquiana's car parked near a dance club and the three pulled into a liquor store across the street from the parked car. They bought a six-pack of beer. They began drinking the beer in the car when they saw a woman leave the club and get into Hiquiana's car. Reliford said, "there she is," and appellant was directed to drive off back in the direction of the Hiquiana's apartment and to go quickly so Hiquiana would not catch up with them. He did so and pulled into a closed gas station next to the apartment complex. Reliford and Clark got out of the car and stood in the rain for a couple of minutes so that they would get wet and the Hiquianas would invite them into the apartment. Appellant saw them leave, enter the apartment, and begin talking with the Hiquianas. He went back to the car and waited. Later on, he looked back

into the apartment window and saw no one, although the lights to the apartment were still on. He went back to the car fell asleep. When he awoke at about 0345, he looked at the apartment and noticed that the lights were out. He approached the building but stopped short of going up to the apartment because he felt scared. He returned to the car and went back to sleep, awaking again at about 0445. He got out of the car and returned to the apartment to get Clark and Reliford to leave with him so that he could go home and get some sleep before going to work. He then saw Reliford stick his head out the door of the apartment apparently motioning him to go home. Appellant returned to his car but before he left he decided to double check with his friends about leaving without them. He backed his car up towards the building and got out. At that time Reliford and Clark came running out of the apartment carrying a box and yelling for appellant to get back into the car and open the door. Appellant did so and a blood covered Reliford and Clark got in. The three then fled the area.

Before this Court, appellant assigns four errors.

I.

THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT APPELLANT AIDED AND ABETTED THE ROBBERY OF LCPL AND MRS. HIQUIANA.

II.

THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE MEMBERS, AS REQUIRED BY R.C.M. 1006(d)(5), THAT A SENTENCE WHICH INCLUDES CONFINEMENT FOR LIFE MAY ONLY BE ADJUDGED IF AT LEAST THREE-FOURTHS OF THE MEMBERS PRESENT VOTE FOR THAT SENTENCE.

III.

APPELLANT'S CONVICTION OF FELONY MURDER CANNOT STAND WHERE HE WAS CONVICTED BY LESS THAN THE THREE-FOURTHS MAJORITY REQUIRED TO SENTENCE HIM TO LIFE IMPRISONMENT IN VIOLATION OF ARTICLE 52(b), UCMJ, WHERE THAT SENTENCE IS THE AUTOMATIC MINIMUM UPON SUCH A CONVICTION.

IV.

THE SENTENCE AS APPROVED BY THE CONVENING AUTHORITY IS INAPPROPRIATELY SEVERE.

In appellant's first assignment he alleges that there is insufficient evidence to establish his guilt of aiding and abetting the robbery of the Hiquianas. We disagree.

Appellant's conviction rested primarily upon his testimony at trial and his statement made to Naval Investigative Service (N.I.S.) investigators. Both in that statement and at trial he claimed that his involvement in the robbery of the Hiquianas was merely a fortuitous result of his desire to be friends with Clark and Reliford. He testified that he didn't take it seriously when he heard Clark say that they (Clark and Reliford) were going to rob Hiquiana, who supposedly had a lot of money in his apartment, and that they were going to kill him and his wife after they got home that night.[1] According to the appellant, he believed this to be part of another in a long line of pranks that Clark and Reliford liked to play on him. Nonetheless, he testified that he went along with the two that night at least in part to keep them out of trouble.

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[1] Hiquiana's name was not mentioned in the initial conversation.

According to his testimony, he was not aware that Clark and Reliford had seriously intended to rob and murder the Hiquianas and that he stayed outside the apartment complex after his friends entered the Hiquiana apartment only out of concern that they otherwise would not have a ride home in the rain. Appellant's claim before this Court is that his statement to the N.I.S. and his testimony at trial establish only an inactive and unknowing presence at the scene of the crime and thus are insufficient bases for a finding that he acted as an aider and abettor. We reject this claim. Even assuming that appellant did not, at first, realize what his friends had in mind that night, the objective evidence overwhelmingly shows that their criminal design was made clear well before Clark and Reliford entered the Hiquiana's apartment.

Appellant was told that the Hiquianas had a good amount of money in their apartment and that Clark and Reliford wanted to steal it. He was with the two when they purchased the rubber gloves and he received a suspiciously incriminating response when he asked what the gloves were to be used for. Appellant was told that Reliford had stalked Raymond Hiquiana and that he knew that Hiquiana would awake at 0100 to pick up his wife from work. This much became patently clear to appellant when, while the three were watching the apartment, the lights inside were turned on at precisely 0100, prompting Reliford to comment that Hiquiana was "right on time." Appellant's own testimony reflects that at that point, appellant thought back to Clark's and Reliford's earlier statements and was concerned that something was wrong. The subsequent spotting of Hiquiana's parked car and the fact that the group stopped on the street nearby, surveilling the scene, coupled with the fact that after Mrs. Hiquiana got into her husband's car appellant and his friends

sped away towards the apartment complex, hoping not to be spotted, provides even more compelling evidence militating against appellant's claim of innocent presence at the scene. Further, the evidence showing that, after the Hiquiana's entered their apartment, Clark and Reliford stood out in the rain to get wet so that the Hiquianas would let them in and the fact that appellant sat outside the apartment in his car for over two hours waiting for the two to come out leads inexorably to the conclusion that appellant knew that Clark and Reliford were there to rob the couple and that he was their means of escape. The evidence in this case clearly points to the fact that appellant knowingly associated with the venture and that he knew that his actions would help Clark's and Reliford's plan to succeed. *See* Article 77, UCMJ; *Nye & Nissen v. United States*, 36 U.S. 613, 619, 69 S.Ct. 766, 769, 93 L.Ed.2d 919 (1949). His presence at the scene was anything but inactive; appellant provided both the means to get to the apartment and the means of escape.[2] The evidence shows that he shared a common purpose to accomplish the criminal design. *United States v. McCarthy*, 11 U.S.C.M.A. 758, 29 C.M.R. (1960).

Appellant's reliance on *United States v. Nakamura*, 21 M.J. 741 (NCMR 1985), is misplaced. In that case, the appellant, a military policeman, was assigned to a mobile unit whose leader turned out to be part of a criminal conspiracy to rob the base exchange. There, we held that the accused's mere presence at the scene of the larceny was not

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[2] The facts also indicate that both Clark and Reliford were relying on the appellant to be waiting for them when they completed their task. Clearly, had there been no criminal understanding between the parties, the two could not have relied on appellant's presence to effect a quick exit from the area. *See* C. Torcia, WHARTON'S CRIMINAL LAW, § 31, p. 166-67 (14th Ed. 1978).

enough to establish that he was an aider and abettor. This finding was predicated, in major part, on the fact that the accused found himself in the middle of a criminal enterprise involving a substantial portion of his claim of command and thus unable to reasonably manifest his disapproval of their criminal activity. In that situation, there was no credible evidence that showed that appellant shared any criminal purpose with the perpetrators of the crime. 21 M.J. at 746.

In this case, however, the evidence of record, when viewed in a light most favorable to the Government, more than amply reveals that appellant, a Corporal, knew that Clark and Reliford, a Lance Corporal and Corporal respectively, were seriously planning to rob the Hiquianas that night and that he knew that his presence would ensure their escape from the area. His claim that he was the hapless dupe of his friends is simply incredible given the evidence of record. The members obviously did not believe him and neither do we. *See United States v. Williams*, 21 M.J. 360 (C.M.A. 1986) (Factfinder is free to disbelieve apparently credible and unrebutted testimony by the accused.) We find there is sufficient evidence of record to support appellant's conviction of felony murder. We are also convinced beyond a reasonable doubt of his guilt thereof. This assignment of error is without merit.

Appellant's second assignment of error that the military judge did not instruct the members that at least three-fourths of them had to vote to impose the mandatory minimum sentence of confinement for life as required by R.C.M. 1006(d)(5) is contradicted by the record. The military judge correctly instructed the members that confinement for life was mandatory in appellant's case. He also correctly instructed the members as to the remaining maximum sentence they could consider. As for the voting pro-

cedures to be used and the required fractions necessary to arrive at a sentence, he instructed the members as follows:

> You then vote on the proposed sentences by secret written ballot. All of you must vote, you may not abstain. Vote on each proposed sentence *in its entirety*, beginning with the lightest proposed sentence, *until you reach the required concurrence, which is three quarters. That means, since there are six of you, at least (sic) five of you have to agree on a sentence before it can be awarded.* The junior member will collect and count the votes. The count is then checked by the president, who will announce the result of the ballots to the members. (Emphasis added).

Record at p. 481. This instruction was clear. While confinement for life was mandated, the sentence "in its entirety" had to be voted upon and at least five of the six members had to agree in a sentence which included confinement for life before it could be adjudged.[3]

Having been correctly instructed, the sentence was proper on its face and the clemency petition submitted by all six court members recommending clemency in the form of confinement for various periods less than life does not improperly impeach the sentence. R.C.M. 1008.

Appellant's third assignment of error is also without merit. The argument that, since a conviction for felony murder carries a mandatory life sentence, the three-fourths majority required to impose the mandatory life

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[3] If defense counsel at trial were not satisfied that this was a sufficiently clear instruction for the members to follow, they had a duty to seek its clarification either by objecting to it or requesting an additional instruction before the members began their deliberations. *United States v. Salley*, 9 M.J. 189 (C.M.A. 1980). Failing to take such action at trial constitutes waiver of the objection on appeal. R.C.M. 1005(f).

sentence should also be required for conviction is contrary to Article 52(a)(2) and (b)(2), UCMJ, and case law. *See United States v. Walker*, 7 U.S.C.M.A. 669, 23 C.M.R. 133 (1957). This argument was implicitly rejected in the 1986 amendments to the Manual for Courts-Martial. *See also* Analysis, R.C.M. 1004(a)(2), App. 21 at A21-65.

We also find no merit in appellant's claim that his sentence is inappropriately severe. Appellant stands convicted of being the wheel man in a brutal robbery and homicide, a conviction which mandates a sentence that includes life imprisonment. *See* Article 118, UCMJ. In his discretion, and after considering the clemency recommendations of the court members, the convening authority reduced the confinement portion of appellant's sentence to twenty-five years. We find the sentence as approved by the convening authority to be appropriate in view of the facts and circumstances of this case.

Accordingly, the findings and sentence as approved on review below are affirmed.

LEO J. COUGHLIN, Senior Judge

A. F. MIELCZARSKI, Judge

N. P. DECARLO Judge

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

No. 58,638
NMCM 86 4317

UNITED STATES, APPELLEE

v.

MICHAEL R. SHROEDER, CORPORAL
U.S. MARINE CORPS, APPELLANT

September 29, 1988

Counsel

For Appellant: *Lieutenant Jeffrey S. Horwitz,* JAGC, USNR (argued); *Commander J. A. Williams,* (JAGC, USN (on brief); *Lieutenant Commander R. J. Smith,* JAGC, USN.

For Appellee: *Major Laura L. Scudder,* USMC (argued); *Captain Wendell A. Kjos,* JAGC, USN (on brief).

Military Judge: Franklin M. Holder and Peter H. Strow

Opinion of the Court

EVERETT, Chief Judge:

As a result of the brutal slaying of a couple in their home on Okinawa, appellant was charged with felony murder and other offenses. The charges were referred as noncapital to a general court-martial with officer members. On the basis of evidence establishing Shroeder's

guilt as an aider and abettor, he was convicted of two specifications of murder while engaged in the perpetration of robbery and two specifications of robbery, in violation of Articles 118(4) and 122, Uniform Code of Military Justice, 10 USC §§ 918(4) and 922, respectively. The sentence adjudged was life imprisonment, a bad-conduct discharge, forfeiture of $300.00 pay per month for 36 months, and reduction to the lowest enlisted grade. After receiving petitions for clemency from all the court members, the convening authority reduced the period of confinement to 25 years but otherwise approved the trial results. The Court of Military Review affirmed in a memorandum opinion.

The issues we have granted, which concern the voting requirements in a felony-murder case, are:

I.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE MEMBERS, AS REQUIRED BY R.C.M. 1006(d)(5), THAT A SENTENCE WHICH INCLUDES CONFINEMENT FOR LIFE MAY ONLY BE ADJUDGED IF AT LEAST THREE-FOURTHS OF THE MEMBERS PRESENT VOTE FOR THAT SENTENCE.

II.

WHETHER APPELLANT'S CONVICTION OF FELONY MURDER CAN STAND WHERE HE WAS CONVICTED BY LESS THAN THE THREE-FOURTHS MAJORITY REQUIRED TO SENTENCE HIM TO LIFE IMPRISONMENT IN VIOLATION OF ARTICLE 52(b)(2), UCMJ, WHERE THAT SENTENCE IS THE AUTOMATIC MINIMUM UPON SUCH A CONVICTION.

We decide both issues against appellant.

I

Prior to findings, the military judge instructed the court members that, to convict Shroeder, they must find him guilty by a two-thirds vote—in this case, four of the six members. The defense made no objection to the instructions; and, in due course, appellant was convicted of the two felony murders and the two robberies.

Before sentence was adjudged by the members, the military judge advised them that, under the provisions of the Uniform Code, the sentence must include life imprisonment. He further instructed that the sentence in its entirety had to receive the votes of three-fourths of the members—five out of six. Again, the defense made no objection. The sentence was announced and was accompanied by a recommendation for clemency on the sentence work sheet. Also, after trial, every member of the court-martial wrote the convening authority to recommend that he exercise clemency as to the confinement adjudged.

II

Article 118 provides that an accused who is found guilty of murder "in the perpetration . . . of . . . robbery" or certain other specified offenses "shall suffer death or imprisonment for life as a court-martial may direct." Article 52(b), UCMJ, 10 USC § 852(b), requires the unanimous vote of the court members for adjudging a death sentence; "the concurrence of three-fourths of the members present at the time the vote is taken," if an accused is "sentenced to life imprisonment or to confinement for more than ten years"; and "the concurrence of two-thirds of the members present at the time the vote is taken" for all other sentences.

Appellant contends that an inconsistency exists between the provision in Article 118 for a mandatory minimum

sentence and the requirement in Article 52(b) for a three-fourths vote of the members present if life imprisonment is adjudged. This contention may be restated as a question: Why did Congress let the members vote on a sentence which is mandatory?

Appellant would resolve the claimed inconsistency by having the military judge make no reference to mandatory life imprisonment but simply instruct the court members that they may adjudge confinement for life only by a three-fourths vote of members present. Moreover, the defense claims that such advice to the members would conform with R.C.M. 1006(d)(5), Manual for Courts-Martial, United States, 1984, which provides that "[w]hen a mandatory minimum is prescribed under Article 118 the members shall vote on a sentence in accordance with this rule." Obviously, if the defense contention is accepted, the mandatory minimum contained in Article 118 becomes a dead letter.

Article 106 of the Code, 10 USC § 906, authorizes a mandatory death sentence for "spies"; but Article 52(b)(1) requires "the concurrence of all the members of the court-martial present at the time the vote is taken." Article 52(b)(1) contains no express provision that the court members are not required to vote when the death sentence is mandatory; but the President apparently has concluded that, for a mandatory death sentence, no vote by the members on sentence is necessary and that the military judge should simply announce the death sentence. *See* R.C.M. 1004(d). If, on the other hand, a vote by the members was intended by Congress even in mandatory death cases, we are sure that it was never intended to mitigate the mandatory death sentence imposed under Article 106 by having the members of the court-martial vote without being instructed that the sentence there adjudged

must include death. Likewise, we conclude that the requirement in Article 52(b)(2) that there must be a three-fourths vote of the members in favor of a sentence "to life imprisonment or to confinement for more than ten years" was not intended to negate the mandatory minimum confinement for life prescribed by Article 118 by preventing the judge from instructing the court members that the sentence must include life imprisonment.

At a rehearing, "no sentence in excess of or more severe than the original sentence may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, *or unless the sentence prescribed for the offense is mandatory.*" *See* Art. 63, UCMJ, 10 USC § 863 (emphasis added). Apparently, Congress contemplated that, if a sentence below the mandatory minimum were adjudged, the convening authority would set it aside and order a rehearing—wherein the mandatory minimum sentence would be imposed. Similarly, the President has directed that, upon "reconsideration" of a sentence, there should be no increase in the sentence announced, "unless . . . [it] was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty." *See* R.C.M. 1009(b). Thus, a way is provided for the members of the court-martial who have adjudged the illegal sentence to correct it promptly.

If, as here, the military judge instructs the court members that they must adjudge a minimum sentence of life imprisonment, as prescribed by Article 118, the need is greatly reduced for utilizing a rehearing on sentence or a reconsideration of sentence as a means to impose the mandatory sentence which Congress prescribed. While these means are available to effectuate the requirements of Article 118, we have no doubt that Congress preferred that the mandatory sentence be adjudged initially—rather than for

an illegal sentence to be adjudged and then corrected by a rehearing or reconsideration.

The fundamental fallacy in appellant's argument is that it assumes an inconsistency between Articles 52(b) and 118 which does not exist. A court-martial sentence may include other punishments besides confinement; and so, even if the court members are instructed that they must adjudge a sentence which includes confinement for life, they still have an area in which to exercise their sentencing discretion. What forfeitures and what type of discharge should be adjudged? Indeed, in this very case, the court members exercised their discretion by imposing partial forfeitures for 3 years, rather than total forfeitures, and a bad-conduct, rather than a dishonorable, discharge.

The mandatory minimum sentence does not entirely deprive the court members of a role in determining what confinement the accused will serve. As in this case, they are free to recommend that clemency be granted as to the mandatory life sentence; and this recommendation was considered by the convening authority—who exercised his unreviewable discretion to grant clemency—as well as by the Court of Military Review and by clemency and parole officials. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).

Admittedly, since the court members must vote on the sentence, they can engage in "jury nullification" and can adjudge a sentence of less than the minimum confinement prescribed by the Code. Of course, such action—which the military judge's instruction was intended to forestall—would be irresponsible as well as unlawful and certainly should not be encouraged.[1] *See United States v.*

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[1] As already noted, if such action is taken by the court members, it can be rectified by reconsideration pursuant to R.C.M. 1009 or by a rehearing unedr Article 63.

Mead, 16 M.J. 270, 275 (C.M.A 1983). Thus, we think it was entirely appropriate for the military judge to instruct—as required by R.C.M. 1005(e)(1)—that, because Shroeder had been found guilty of felony murder, any sentence adjudged by the court members must include confinement for life.

III

Article 52(a) provides that "[n]o person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken" and that "[n]o person may be convicted of any other offense, except" by the military judge pursuant to a guilty plea "or by the concurrence of two-thirds of the members present at the time the vote is taken." Appellant argues that to allow conviction of felony murder by a two-thirds vote of the members is inconsistent with the voting requirements prescribed by Article 52(b) for sentencing and with the mandatory minimum sentence requirement of Article 118. He would resolve the inconsistency by insisting on a three-fourths vote for conviction of a felony murder or of any other crime for which life imprisonment is mandatory.[2]

Long ago this Court, rejecting a similar argument, held that only a two-thirds vote was required to convict of premeditated murder, even though Article 52(b)(2) called for a three-fourths vote of the members to impose a life sentence. *United States v. Walker*, 7 U.S.C.M.A. 669, 23

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[2] Currently, the only mandatory sentences prescribed by the Code are the mandatory death sentence for "spies," *see* Article 106, and the mandatory minimum sentence for life imprisonment if the accused is found guilty of premeditated murder or felony murder, *see* Article 118.

C.M.R. 133 (1957). Since that time no change has been made in the relevant provisions of the Code, so we assume that Congress was content with our interpretation.

Perhaps it would be desirable to have the same voting requirements for members to convict of a crime and to sentence the accused for that crime. Indeed, under Article 52 only a two-third vote is required to convict of all offenses other than those for which death is mandatory; and, unless the sentence adjudged is 10 years or more, only a two-thirds vote is required for the sentence. Moreover, in the 1984 Manual, *supra*, the President – exercising his powers as Commander-in-Chief, *see* Drafters' Analysis, Manual, *supra* at A 21-65, February 1986 Amendment – has mandated that, if an accused is convicted of a crime for which the death sentence is authorized but not mandatory, a death sentence may not be adjudged unless the accused was found guilty by unanimous vote of the court-martial members. *See* R.C.M. 1004(a)(2).

Even so, we remain convinced that the language of the Code and of the Manual is clear and in all cases requires only a two-thirds vote to convict – unless a death sentence is mandatory or, is not mandatory, is actually adjudged. We perceive nothing arbitrary or irrational in this arrangement. As we noted in *Walker*, the "acts of voting" on findings and sentence are "separate and distinct," *see* 7 U.S.C.M.A. at 674, 23 C.M.R. at 138. Not only do they occur at different times, but they differ in other ways.

The vote on the findings concerns whether the Government has proved beyond reasonable doubt that the accused was guilty of certain crimes. The vote on the sentence involves moral judgments of the court members, their predictionss as to the rehabilitation of the accused and the deterrence of others that will result from various permissible sentences, and many other factors. We do not

see why the factual evaluation and the determination of an appropriate sentence must necessarily be made by the same percentage of the members' votes.

Currently military law does distinguish between the capital and the non-capital case in prescribing the voting percentages required for conviction. We find nothing arbitrary in making this distinction; and, indeed, the unique treatment of capital cases is well-recognized in the law.

Moreover, we believe that Congress could lawfully have gone further and made gradations in the voting percentages for convictions that would parallel the gradations in the voting percentages applicable in determining what sentence may be imposed in a case. However, such a system would be very difficult to administer—and especially so since, in courts-martial, there is a unitary sentence and often many unrelated offenses are joined for trial. Thus, we are convinced that a rational basis exists for the Code's current requirement of a two-thirds vote to convict of any offense except one for which the death sentence is mandatory; and so this requirement does not create an equal protection or other constitutional problem.

We also see nothing arbitrary in the requirement of Article 52(b) that sentences of 10 years or more must command a three-fourths majority of the court members' vote—instead of only the two-thirds majority necessary to convict. Constitutionally, Congress was free to decide either that voting percentages for sentences should parallel the severity of the sentence to be adjudged or, instead, to mandate that—at least, apart from capital cases—the same voting percentages would apply to all sentences.

In sum, appellate defense counsel have not shown us any reason to depart from the interpretation which this court gave more than three decades ago to the Code's

voting requirements, *see United States v. Walker, supra*—an interpretation which was predicated on the plain language of the Code. Accordingly, we are convinced that the military judge did not err in instructing the court members that only a two-thirds vote was required to convict Shroeder of the offenses charged.[3]

IV

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

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[3] We do not know whether, in fact, more than two-thirds of the court members voted to convict. In view of our interpretation of the Code, it is unnecessary to inquire whether findings of guilty could be sustained if, in a post-trial hearing convened pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), the Government could prove that the court members had voted for conviction by a vote of more than two-thirds.

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